overrule an earlier construction. A recent California decision [10] which shifts the burden of overruling such a line of decisions to the legislature is open to the same criticism as the highest courts of England. In *Johnson* v. *Cadillac Motor Car Co.*[11] the court did not hesitate to overrule its earlier decision upon the identical case when upon careful reflection it determined that the principle of law which it had laid down was incorrect. It is refreshing to see a court willing to admit its error openly. When once a court has reached the conclusion that a prior decision is wrong it is much better to overrule it expressly than to purport to follow it and yet construct subtle distinctions every time the general principle involved arises. Such a straightforward attitude will go a great way in successfully combating the attack which is often launched against our so-called case law,[12] and will furnish an impetus for careful legal thought which, combined with our respect for and adherence to judicial precedents, will preserve the wonderful living characteristics of the Anglo-American legal system.[13]

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EFFECT OF IMPOSITION BY IMPERSONATION IN THE LAW OF BILLS AND NOTES. — The recent case of *Montgomery Garage Co.* v. *Manufacturers' Liability Ins. Co.*[1] illustrates the problem presented by the not infrequent fraud of impersonation. A represented himself as X to the defendant and received a check drawn to X's order. The *bona fide* purchaser from A was allowed to recover on the ground that the defendant intended A rather than X as the payee and the proper person to indorse. The decision follows the present trend of authority.[2] This species of fraud is met with in other branches of the law;[3] and the problems arising therefrom are generally handled in the same way.

Upon analysis the question resolves itself into effectuating the intent of the victim, a matter of no small difficulty when it is considered that the defrauded party has more than one intent. Where the impostor is physically present, the intent of the victim to deal with the personality before him is deemed paramount.[4] The intent to deal with the individual whom the impostor is impersonating is *ex necessitate* disregarded. This is equally the law in Sales.[5] However, an unwarranted distinction is

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[10] *In re* Riccardi, 189 Pac. 694 (Cal.) (1920). See RECENT CASES, p. 93, *infra*.

[11] 261 Fed. 878 (Circ. Ct. App.) (1919). See RECENT CASES, p. 93, *infra*.

[12] See "The Law of the Case," 51 CAN. L. JOUR. 95, where a vigorous attack is made against the present-day methods of studying law and of making decisions.

[13] See Charles E. Blydenburg, "*Stare Decisis*," 86 CENT. L. JOUR. 388.

[1] 109 Atl. 296 (N. J. 1920). See RECENT CASES, p. 84, *infra*.

[2] United States *v.* Nat. Bank, 45 Fed. 163 (1891); Boatsman *v.* Stockmen's Nat. Bank, 56 Colo. 495, 138 Pac. 764 (1914); Metzger *v.* Franklin Bank, 119 Ind. 359, 21 N. E. 973 (1889); Emporia Bank *v.* Shotwell, 35 Kan. 360, 11 Pac. 141 (1886); Robertson *v.* Coleman, 141 Mass. 231, 4 N. E. 619 (1886); McHenry *v.* Citizens Bank, 85 Oh. St. 203, 97 N. E. 395 (1911); Land Title and Trust Co. *v.* Nat. Bank, 196 Pa. 230, 46 Atl. 420 (1900); Jamieson *v.* Heim, 43 Wash. 153, 86 Pac. 165 (1906).

[3] See WILLISTON, SALES, § 635; Clarence Ashley, "Mutual Assent in Contract," 3 COL. L. REV. 71. See also 68 U. OF PA. L. REV. 387.

[4] Robertson *v.* Coleman, *supra;* Famous Shoe Co. *v.* Crosswhite, 124 Mo. 34, 27 S. W. 397 (1894); Land Title and Trust Co. *v.* Nat. Bank, *supra;* Heavey *v.* Commercial Nat. Bank, 27 Utah, 222, 75 Pac. 727 (1904).

[5] Phillips *v.* Brooks, Ltd., [1919] 2 K. B. 243; Edmunds *v.* Merchants' Co., 135 Mass. 283 (1883); Phelps *v.* McQuade, 220 N. Y. 232, 115 N. E. 441 (1917).

sometimes made when the imposition is effected through correspondence. In the law of Sales, the intent to deal with the party actually carrying on the correspondence has been held subsidiary to the intent to negotiate with the party whose name is used.[6] There are a few cases in the law of Bills and Notes in accord;[7] but the majority of decisions draw no distinction between impersonation by correspondence[8] or in the presence of the victim. It is indeed difficult to determine which of the two conflicting intents should be effectuated; but that the result should be the same, whether the impostor appears in person or whether he acts through correspondence, would appear to be the better reasoning.[9] In truth, the propriety of metaphysically ascertaining a dominant intent may well be disputed. Why would it not be consonant with justice to say in all these cases that so long as there is any intent to deal with the very party who is actually present, writing, telegraphing, or telephoning, that intent shall be paramount whenever the rights of a *bona fide* purchaser intervene?

Though the argument *contra* has been presented with much vehemence,[10] it is hard to see why any loss due to fraudulent impersonation should fall upon the indorsee. This is not the general rule in regard to fraud.[11] To cleave too closely to the contention that this is a forgery[12] through which the holder cannot acquire any rights is fallacious. The fact that the impostor is criminally liable for forgery is not conclusive. Before we can say that there has been a forgery defeating any rights of the purchaser against the drawer, we must first determine whether the person who purports to sign is the person intended by the drawer to sign. To decide that there has been a forgery begs the very question in issue. Again, too much emphasis should not be laid on the name. A name is not the sole method of designating an individual. If the name *per se* were controlling, then a John Smith who wrongfully indorsed a check payable to John Smith, another individual, should pass a good title to the instrument. But such is not the law;[13] the man who was intended

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[6] Cundy *v.* Lindsay, 3 A. C. 459 (1878).

[7] Palm *v.* Watt, 7 Hun (N. Y.), 317 (1876); Mercantile Bank *v.* Silverman, 148 N. Y. App. Div. 1, 132 N. Y. Supp. 1017 (1911), affirmed 210 N. Y. 567, 104 N. E. 1134. But see First Nat. Bank *v.* Amer. Exch. Bank, 49 N. Y. App. Div. 349, 63 N. Y. Supp. 58 (1900), affirmed 170 N. Y. 88, 62 N. E. 1089.

[8] Boatsman *v.* Stockmen's Nat. Bank, *supra;* Metzger *v.* Franklin Bank, *supra;* Maloney *v.* Clark, 6 Kan. 82 (1870); Hoffman *v.* Amer. Exch. Bank, 2 Nebr. (Unof.) 217, 96 N. W. 112 (1901).

[9] See Clarence Ashley, "Mutual Assent in Contract," 3 COL. L. REV. 71, 75, 76.

[10] Western Union *v.* Bimetallic Bank, 68 Pac. 115 (1902); Gallo *v.* Brooklyn Savings Bank, 199 N. Y. 222, 92 N. E. 633 (1910); Tolman *v.* Amer. Exch. Bank, 22 R. I. 462, 48 Atl. 480 (1901); Simpson *v.* Denver, etc. R. Co., 43 Utah, 105, 134 Pac. 883 (1913).

[11] See Smith *v.* Livingston, 111 Mass. 342 (1873); Scandinavian Bank *v.* Johnston, 63 Wash. 187, 115 Pac. 102 (1911); NORTON, BILLS AND NOTES, 4 ed., 357; NEGOTIABLE INSTRUMENTS LAW, §§ 55, 57.

[12] Both at the common law and under the negotiable instruments law the purchaser takes the risk of forgery. Rossi *v.* Nat. Bank, 71 Mo. App. 150 (1897); Shaffer *v.* McKee, 19 Oh. St. 526 (1869); *cf.* especially cases in note 13, *infra.* See NEGOTIABLE INSTRUMENTS LAW, § 23; BRANNAN, NEGOTIABLE INSTRUMENTS LAW, ANN., 3 ed., 81 *et seq.*; Hamlins Wizard Oil Co. *v.* U. S. Express Co., 265 Ill. 156, 106 N. E. 623 (1914).

[13] Mead *v.* Young, 4 T. R. 28 (1790); Beattie *v.* Nat. Bank, 174 Ill. 571, 51 N. E. 602 (1898); Thomas *v.* First Nat. Bank, 101 Miss. 500, 58 So. 478 (1912); Graves *v.* Amer. Exch. Bank, 17 N. Y. 205 (1858).

as payee should indorse, and no other. Similarly where the name of the payee is wrongly designated, an indorsement by the party intended as payee will pass a good title, despite the variance in names.[14]

In these cases, the negligence or diligence of the defrauded party — generally the drawer of the instrument — should not, as a rule, be material in determining his liability.[15] Nevertheless a rule which will protect the *bona fide* purchaser accords with justice. The consequences of the mistake should fall upon the drawer rather than on the purchaser, since the mistake is primarily the former's, whether he has himself been deceived or has deliberately tried to shift the burden of identification by giving the impostor a negotiable instrument[16] instead of cash. The fraud upon the drawer facilitated a fraud upon the purchaser. In short, the defrauded drawer of the instrument should have an equitable or personal defense rather than a legal or real defense.[17] No difficulty should be experienced in handling the variety of facts which may be presented, if impersonation is treated like fraud and not like forgery. In this way some certainty,[18] an undoubtedly desirable attribute in this branch of the law, can be approximated.

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CONSTRUCTIVE MURDER — DRUNKENNESS IN RELATION TO *MENS REA*. — The actual decision and the *dicta* in a recent case in the House of Lords [1] nicely illustrates the incessant struggle between the objective and the subjective points of view in the criminal law,[2] — between the idea of punishment as retribution based on desert,[3] and that of punishment as prevention based on social necessity.[4] The defendant in perpetration of rape upon a young girl put his hand over her mouth to stifle her cries and thus suffocated her. On an indictment for murder, his defence was that he was so drunk that he did not know his acts to be dangerous. He was convicted of murder and the conviction is here sustained.

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[14] Moore *v.* Anderson, 8 Ind. 18 (1856); Shaw, Kendall & Co. *v.* Brown, 128 Mich. 573, 87 N. W. 757 (1901). See NEGOTIABLE INSTRUMENTS LAW, § 43.

[15] See Charles L. McKeehan, "A Review of the Ames-Brewster Controversy," 41 AMER. L. REG. N. S. 503, 507.

[16] Gallo *v.* Brooklyn Savings Bank, *supra*, and Western Union *v.* Bimetallic Bank, *supra*, in effect permit a drawer, who is dubious and hesitant about giving cash, to protect himself absolutely by writing out a check. In other words, the drawer can successfully shift to the purchaser of the check the entire responsibility of identification. The decisions in these two cases, it is submitted, are erroneous.

[17] As to the nature of defenses, real and personal, see the late Dean Ames' learned summary. 2 AMES, CASES ON BILLS AND NOTES, 811–813.

[18] See Charles L. McKeehan, "A Review of the Ames-Brewster Controversy," *supra*, 508, n. 12.

[1] Director of Public Prosecutions *v.* Beard, [1920] A. C. 479. See RECENT CASES, 89.

[2] There are here two fundamentally conflicting schools of juristic thought. Both start from the act which injures the state, but the one focuses on the determination of the moral blameworthiness of the actor, the other on the repressive control of certain types of action.

[3] See SIR JAMES STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND, 1 ed., 99; WOOLSEY, POLITICAL SCIENCE, 334.

[4] See HOLMES, COMMON LAW, Ch. II; SALMOND, JURISPRUDENCE, 4 ed., §§ 28, 29. However important the preventive aspect of the criminal law may be, it is doubtless true that "punishment is not just because it deters; it deters because it is felt to be just." See Victor Cousin, Preface to the Gorgias of Plato.